

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

EMILY EUBANK)	
Claimant)	
VS.)	
)	Docket No. 1,042,622
STATE OF KANSAS)	
Respondent)	
AND)	
)	
STATE SELF INSURANCE FUND)	
Insurance Carrier)	

ORDER

Respondent appeals the April 28, 2009, Order For Medical Treatment of Administrative Law Judge Brad E. Avery (ALJ). Claimant was awarded medical treatment with orthopedic surgeon Thomas P. Phillips, M.D., of the Dickson-Diveley Midwest Orthopaedic Clinic.

Claimant appeared by her attorney, Jeff K. Cooper of Topeka, Kansas. Respondent and its insurance carrier appeared by their attorney, Bryce D. Benedict of Topeka, Kansas.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the documents filed of record in this matter.

ISSUE

Did the ALJ exceed his jurisdiction or deny respondent its due process rights by issuing an order for medical treatment without allowing respondent the opportunity to present evidence or make argument, in contravention to K.S.A. 44-534a(a)(2)?

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed as respondent's due process rights were not violated by the April 28, 2009, Order For Medical Treatment of the ALJ.

It is undisputed that claimant suffered an accidental injury on January 7, 2008, when she struck her left knee on a doorframe. The matter proceeded to preliminary hearing after the Notice of Preliminary Hearing was filed on December 30, 2008, setting the preliminary hearing for January 29, 2009. Both parties appeared for the preliminary hearing, but no record of the hearing was created. Instead, by agreement, the ALJ issued an Order Referring Claimant For Independent Medical Evaluation on January 30, 2009. The Order referred claimant to the Dickson-Diveley Midwest Orthopaedic Clinic with the first available doctor to provide an evaluation and disability rating regarding claimant's work-related injury and recommendations for future medical treatment, as well as any restrictions which the doctor deemed appropriate. The Order specifically notes that the parties have the right to depose the doctor if that is deemed necessary. However, notice of intent to depose the doctor was to be provided to the Court.

An independent medical evaluation (IME) was completed on March 27, 2009, by Dr. Phillips. The report was directed to the ALJ, with copy to both counsel for claimant and counsel for respondent. No objection to this report is contained in this record. On April 28, 2009, the Order For Medical Treatment was issued by the ALJ. On April 30, 2009, counsel for respondent sent a letter to the ALJ requesting that the ALJ set aside the order for treatment. In a letter to counsel for respondent, dated May 8, 2009, the ALJ denied respondent's request, noting that respondent filed no objection to the ordered IME. The letter also noted a lack of a request for a second preliminary hearing in the record. The ALJ further pointed out that there were no compensability objections raised by the respondent at the time of the preliminary hearing. The only issue at the time of the preliminary hearing appears to be claimant's need for additional medical treatment.

PRINCIPLES OF LAW AND ANALYSIS

Claimant argues that, as this is a medical treatment order from a preliminary hearing, the Board does not have jurisdiction to consider the order. However, while claimant would be correct if this dispute only involved the providing of medical treatment, the dispute here involves respondent's due process rights under the Workers Compensation Act. The Board has previously ruled that the question of whether a denial of due process constitutes an issue of whether the administrative law judge exceeded his

or her jurisdiction gives the Board jurisdiction to decide the matter on appeal from a preliminary hearing order.¹

The essential elements of due process of law in any judicial hearing are notice and an opportunity to be heard and defend in an orderly proceeding adapted to the nature of the case.²

No particular form of proceeding is required to constitute due process in administrative proceedings; all that is required is that the liberty and property of the citizen be protected by rudimentary requirements of fair play. Its requirements include the revelation of the evidence on which a disputed order is based, an opportunity to explore that evidence, and a conclusion based on reason; and its essential requirements are met where the administrative body is required to determine the existence or nonexistence of the necessary facts before any decision is made.

Whether or not a person has been deprived of due process of law by the action of an administrative agency or body depends on whether it acted contrary to the statutes and rules and with arbitrary and unreasonable discrimination. Denial of due process occurs where the exercise of power by an administrative officer or body is arbitrary or capricious, where a decision of a board or commission is based on mere guesswork as to an essential element, or where a finding is unsupported by any evidence.³

The parties to this action were noticed up for a preliminary hearing scheduled for January 29, 2009. The parties attended the hearing and agreed that claimant would be sent for an IME to aid in the determination of claimant's need for further treatment. The IME report of Dr. Phillips did exactly that. Claimant was recommended for an arthroscopic lateral release of the left patella. Dr. Phillips also recommended claimant be restricted to light duty with sedentary work only until the proposed surgery is accomplished. As noted above, the report of March 27, 2009, was sent to the ALJ, with copy to both attorneys. No objections to the report or the recommendations contained in the report were filed with the ALJ. The Order was not authored until April 28, 2009, one month after the date of the IME report. Had respondent wanted to object to the contents of the report, more than enough time was allowed for that objection to be filed. The original order of January 30, 2009,

¹ *Graham v. A+ Sweeping, Inc.*, No. 206,881, 1997 WL 378652 (Kan. WCAB June 12, 1997).

² *Collins v. Kansas Milling Co.*, 207 Kan. 617, 485 P.2d 1343 (1971).

³ 73 C.J.S. Public Administrative Law and Procedure, § 59; See also *Johnston Coal & Coke Co. v. Dishong*, 198 Md. 467, Syl. ¶ 5, 84 A. 2d 847 (1951); *Kaufman v. Kansas Dept. of SRS*, 248 Kan. 951, 811 P.2d 876 (1991); *Peck v. University Residence Committee of Kansas State Univ.*, 248 Kan. 450, 807 P.2d 652 (1991); *Kansas Racing Management, Inc. v. Kansas Racing Comm'n*, 244 Kan. 343, 770 P.2d 423 (1989).

made it clear that the parties had the right to depose the doctor if desired, with notice to the Court.

An administrative hearing, particularly where the proceedings are judicial or quasi-judicial, must be fair, or as it is frequently stated, full and fair, fair and adequate, or fair and open. The right to a full hearing includes a reasonable opportunity to know the claims of the opposing party and to meet them. In order that an administrative hearing be fair, there must be adequate notice of the issues, and the issues must be clearly defined. All parties must be apprised of the evidence, so that they may test, explain, or rebut it. They must be given an opportunity to cross-examine witnesses and to present evidence, including rebuttal evidence, and the administrative body must decide on the basis of the evidence.⁴

The parties to this action were provided the opportunity for a preliminary hearing and declined. The request for medical treatment was well documented in this record and the IME was ordered for that purpose. The order detailed the right of the parties to depose the doctor if desired, and nearly a full month expired between the issuance of the IME report and the order for medical treatment, plenty of time for any party to depose the doctor or request another preliminary hearing. No action was taken.

Due process requires the opportunity for a hearing, to depose witnesses and provide evidence supporting a party's position. Due process does not require a hearing, just the availability of that hearing. Here, the hearing was noticed and the parties elected to forgo that procedure. The right to depose the doctor was made available, but not acted upon. A party is just as responsible for protecting its due process rights as is the administrative law judge. Respondent's contention that its due process rights were violated by the actions of the ALJ is not supported by this record. The Order For Medical Treatment of the ALJ remains in full force and effect.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁵ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

⁴ 73 C.J.S. Public Administrative Bodies and Procedure, § 132, pp. 456-458.

⁵ K.S.A. 44-534a.

CONCLUSIONS

Respondent has failed to prove that its due process rights were violated by the ALJ. The Order of the ALJ remains in full force and effect.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order For Medical Treatment of Administrative Law Judge Brad E. Avery dated April 28, 2009, remains in full force and effect.

IT IS SO ORDERED.

Dated this ____ day of July, 2009.

HONORABLE GARY M. KORTE

c: Jeff K. Cooper, Attorney for Claimant
Bryce D. Benedict, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge